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In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, INDIVIDUALLY AND AS MAYOR OF THE CITY OF PAWTUCKET, RICHARD A. MUMFORD, INDIVIDUALLY AND AS FINANCE DIRECTOR FOR THE CITY OF PAWTUCKET, AND GUY DUFAULT, INDIVIDUALLY AND AS DIRECTOR OF DEPARTMENT OF PARKS AND RECREATION OF THE CITY OF PAWTUCKET, AND THE CITY OF PAWTUCKET,

PETITIONERS,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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I

QUESTION PRESENTED

Does Municipal Sponsorship of a Traditional and Dominantly Secular Christmas Celebration Which Includes a Creche Violate the Establishment Clause?

TABLE OF CONTENTS

	Page
Question Presented	1
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
Summary of Argument	7
Argument	10
I. The City's Passive Display of a Creche as Part of a Dominantly Secular Christmas Celebration Does Not Constitute an Establishment of Religion	10
A. Establishment Clause Principles Do Not Prohibit a Public Observance of Christmas Which Includes Acknowledgment of the Nativity Theme in the Holiday Tradition.	10
B. The City's Christmas Celebration Is Not a Religiously Discriminatory Action Requiring Strict Scrutiny and a Compelling Justification	21
C. The Inclusion of a Creche in a Traditional and Diverse Public Christmas Celebration Has a Secular Purpose, Has No Primary Religious Effects, and Does Not Foster Excessive Entanglements	24
Applying the Test	25
Secular Purpose	29
Nonreligious Primary Effects	32
The Absence of Entanglements	37
Conclusion	42

TABLE OF AUTHORITIES

Cases

Page

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 12, 13, 14, 25, 29, 35
Allen v. *Morton*, 405 F.2d 64 (1973) 20, 37
Board of Education v. *Allen*, 392 U.S. 236 (1968) 13, 33
Bradfield v. *Roberts*, 175 U.S. 291 (1899) 13
Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973) 10, 14, 29, 32, 35, 38, 40, 42
Conrad v. *City and County of Denver*, __ Colo., __ 656 P.2d 662 (1982) 22, 23
Engel v. *Vitale*, 370 U.S. 421 (1962) 13, 14, 26
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 29
Everson v. *Board of Education*, 330 U.S. 1 (1947) 33
Florey v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 449 U.S. 987 (1980) 15, 38
Hunt v. *McNair*, 413 U.S. 734 (1973) .. 14, 24, 33, 35, 38, 42
Larkin v. *Grendel's Den, Inc.*, U.S. , 102 S.Ct. 1765 (1982) 30, 32, 34
Larson v. *Valente*, U.S. , 102 S.Ct. 1673 (1982) .. 7, 9, 21, 22, 23
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 6, 13, 23, 24, 29, 32, 38, 40, 41
McCollum v. *Board of Education*, 333 U.S. 203 (1948) . 11, 12
McGowan v. *Maryland*, 366 U.S. 420 (1960) . 8, 10, 14, 29
Meek v. *Pittenger*, 421 U.S. 349 (1975) 13, 23, 29, 32
Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) .. 33, 34, 36, 38
Stone v. *Graham*, 449 U.S. 39 (1980) 14, 26, 29, 35
Tilton v. *Richardson*, 403 U.S. 672 (1971) . 13, 33, 36, 38, 42
Walz v. *Tax Commission*, 397 U.S. 664 (1970) 30, 37
Widmar v. *Vincent*, 454 U.S. 263 (1981) .. 27, 28, 33, 34, 36
Wolman v. *Walter*, 433 U.S. 229 (1977) 42
Zorach v. *Clauson*, 343 U.S. 306 (1952) 12, 14, 15, 20

Constitutional Provisions:

	Page
First Amendment to the United States Constitution	2
Fourteenth Amendment to the United States Constitution	2

Statutes:

5 U.S.C. Section 6103 (Supp. II, 1972)	17
28 U.S.C. Section 1254(1)	2
R.I. General Laws, 1956, 1979 Reenactment, Section 25-1-1	17

Other Authorities:

Barnett, *The American Christmas*, The MacMillan Company, 1954 ..... 16, 17, 18, 19, 36

Coffin, *The Book of Christmas Folklore*, The Seabury Press, 1973 ..... 18, 20

Eleanor Roosevelt's Christmas Book, Dodd, Mead & Company, 1963 18

Giannella, "Religious Liberty, Non-Establishment and Doctrinal Development Principle", 81 Harv. L. Rev. 513 (1968) 16

Messages and Papers of the Presidents, Bureau of National Literature, Inc., 1897 15

Meyers, *Celebrations: The Complete Book of American Holidays*, Doubleday & Company, 1972 ..... 16, 17, 20

Miles, *Christmas Customs and Traditions*, Dover Publications, Inc., 1976 (republication of 1912 original) .. 16, 20

Note, "The Establishment Clause, Secondary Religious Effects, and Humanistic Education", 91 Yale L. Journ. 1196 (1982) 33

Tribe, *American Constitutional Law*, The Foundation Press, Inc., 1978 ..... 20, 36

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 621 F.2d 1029, and appears at pp. A-1 to A-20 in the Petition for a Writ of Certiorari. The opinion of the United States District Court for the District of Rhode Island is reported at 525 F.Supp. 1150 and appears at pp. A-21 to A-74 in the Petition for a Writ of Certiorari.

Jurisdiction

The decision of the United States Court of Appeals for the First Circuit was rendered on November 3, 1982, its mandate issued on November 24, 1982. The Petition for a Writ of Certiorari was filed on January 26, 1983, and the Writ was issued on April 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

For over forty years, the City of Pawtucket, Rhode Island, has celebrated the Christmas holiday with traditional displays, decorations, and music. (J.A. 105) The principal com-

ponents of the observance are situated in four locations throughout the City. (J.A. 52, 53) One of the displays is in Hodgson Park, privately owned property, in the heart of the retail commercial district. (J.A. 45, 107, 108) That park, situated on the east and west banks of the Blackstone River, is bounded in part by the City's two major retail stores. (J.A. 107, 108) A second part of the celebration takes place at the municipal ice rink, which is decorated for Christmas (J.A. 53), and where the City sponsors a Christmas party for mentally retarded children. (J.A. 53) In the City's Slater Park, a carousel is decorated with Christmas lights and occupied by a live Santa Claus. (J.A. 53) Near the original Samuel Slater Mill and the Mill Museum, the City Hall is lighted and decorated, and Christmas music is played through a sound system. (J.A. 53)

The observance of Christmas is only part of the City's annual sponsorship of national holidays. During the year, the City expends money to conduct or assist ceremonies on Memorial Day and Veteran's Day and to present parades and fireworks displays on the Fourth of July. (J.A. 54, 110, 111) The immediate area surrounding Hodgson Park has for years been the subject of an intensive redevelopment effort which has aesthetic, commercial, and cultural objectives. (J.A. 109, 110) The downtown mall near Hodgson Park is used at various times throughout the year for traditional celebrations as part of the commercial promotion of the area. (J.A. 110, 111) The Christmas celebration—especially the lighted display at Hodgson Park—is sponsored by the City in cooperation with the downtown retail merchants association, which regards the Christmas display as part of the commercial promotion of the downtown business district. (J.A. 107)

Hodgson Park is owned by a private non-profit organization which operates and maintains the nearby Slater Mill Museum, a national historic site. (J.A. 108, 109) The City's use of the museum property during the Christmas season is by informal oral arrangement with the organization. (J.A. 35) This Park

property comprises approximately 40,000 square feet, divided by the Blackstone River, with 21,000 square feet on the west bank and 19,000 square feet on the east bank of the River. (J.A. 90) The City-owned Christmas display at Hodgson Park distributes along both banks of the River much of the traditional symbolism of the season with approximately 2,500 colored lights and 12 spotlights. (J.A. 40) There are a 40-foot high lighted spruce tree, other real and artifical Christmas trees, figurines, wooden representations of stars and trees, cartoon characters, snowmen, a wishing well, a Santa Claus sleigh pulled by reindeer, a miniature New England village, a grouping of caroling figurines, artifical candles, candy canes, striped poles and a podium used by a live Santa Claus. (J.A. 51, 52) The east bank River wall proclaims "SEASONS GREETINGS" in lettering 48-feet long and 4-feet high. (J.A. 47)

The west bank portion of the Hodgson Park display includes a nativity scene or creche which covers approximately 140 square feet out of the total 40,000 square feet. (J.A. 45) There is a manger and figurines, which range in height from 5 inches to 5 feet (J.A. 52): the infant, parents, shepherds, kings and animals. (J.A. 52) This nativity scene is surrounded by the 40-foot spruce tree, the 7 foot high and 5 and ½ foot wide wishing well, Santa Claus and reindeer, 15 feet high and 25 feet long, and the Santa Claus house, 14 feet high and long and 11 feet wide. (J.A. 51) Away from the immediate area of the nativity scene other structures and figurines are as large or larger than the nativity figures. (J.A. 51) The visual effect of the nativity scene would depend entirely upon the vantage point of the visitor. (J.A. 49) In the immediate vicinity, it would be clearly visible, but at many locations it would be barely discernible or not visible at all. (J.A. 64; Def. Ex. B, C-2, C-3, J.A. 46, 170-177, R. Vol. I, 21, 22) The monetary value of this creche is less than 5% of the monetary value of the entire Hodgson Park display. (J.A. 45) The total display is valued at approximately $5,000, of which the value of the creche is approximately $200. (J.A. 45) Since its purchase in

1973 for $1,365, there has been no maintenance or improvement. (J.A. 33-34) The erection and dismantling of the displays requires about 600 service hours by City employees, of which time 2 hours are spent on the nativity scene. (J.A. 30-31) The annual cost of erection and dismantling approximates $4,500, of which $20 is attributable to erecting and dismantling the creche. (J.A. 42)

None of the Christmas activities at Hodgson Park or at the other three locations has any religious character, nor is in any way connected with the nativity scene. (J.A. 53) In addition to the Christmas party for the mentally retarded at the ice rink, there are free carousel rides at Slater Park presided over by a live Santa Claus who distributes candy. (J.A. 53) At City Hall, which also contains interior Christmas decorations, there is caroling and a Christmas party. (J.A. 53) The Hodgson Park display is opened for the season by a ceremony during which the Mayor turns on the 2500 lights and 12 spotlights and a Santa Calus arrives on a fire truck. (J.A. 40, 52)

This traditional public celebration of Christmas never occasioned comment or controversy before the filing of this legal action. (J.A. 99, 105) The celebration had taken place annually for over 40 years without complaint or discord. (J.A. 105) The complaint in this case was filed on December 17, 1980, and a temporary restraining order requested for Christmas week. At that point, for the first time in the history of the City's Christmas celebration, substantial public controversy arose. (J.A. 99) The public controversy was directed at this lawsuit. (J.A. 99) Many of the public complaints expressed the view that the challenge to the Christmas display was trivial. (J.A. 100) The specific viewpoints expressed were varied as to why that tradition should continue. (J.A. 96) Many of the public expressions came from outside the community and outside the State of Rhode Island. (J.A. 94) Much of the public opinion was "... a questioning why anybody would enter into a challenging of what has been a very joyous occasion for all people." (J.A. 95)

The District Court enjoined the City from continuing to include the creche in its celebration. The tri-partite test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) was applied by focusing upon the creche abstracted from the Hodgson Park display and from the celebration as a whole and from the annual practice of holiday observances. It was held that the nativity scene, so isolated from its context, was an unsecularized religious symbol which had the purpose and primary effect of advancing religion rather than expressing the Christmas holiday. Notwithstanding the host of secular symbols surrounding the creche and the City's position that in applying the tri-partite test the appropriate focus is not on the religious element but on the activity of which it is a part, the District Court said that "In the Court's view, this overstates the role that the context in which the religious component appears plays...". (Cert. Pet. A-51). Although the Court expressly recognized the "passive nature" of the display of the creche, it concluded that "using a religious symbol in a seasonal celebration of a holiday...has singled out...religious beliefs as worthy of particular attention...". (Cert. Pet. A-66, A-69) On the basis of the evidence relating to public controversy which arose out of the commencement of this legal action, it was also held that "excessive entanglements" existed.

The Court of Appeals for the First Circuit, by divided vote, affirmed the issuance of the injunction against maintenance of the creche. The majority opinion adopted the lower Court's analytical isolation of the creche from the City's entire Christmas celebration and from the rest of the Hodgson Park display. Agreeing with the characterization of the creche as an exclusively religious symbol, the majority concluded that its purpose and primary effect were the advancement of religion. However, the Court of Appeals' majority, noting the lower Court finding that "administrative entanglement between government and religious organizations had not occurred"

with reference to the evidence that this legal action had produced public controversy which had never before existed in the 40-year maintenance of the Christmas display with its nativity scene, stated that it was "unwilling to place much weight on the Court's determination that the City's actions risked political divisiveness along religious lines." (Cert. Pet. A-12)

Additional to the application of the tri-partite test, the majority opinion in the Court of Appeals also held that the sponsorship of the creche was a discriminatory religious preference which made it suspect and invalid under the "strict scrutiny" analysis, relying for its conclusion upon *Larson* v. *Valente*, U.S. , 102 S.Ct. 1673 (1982).

The dissenting opinion in the Court of Appeals disagreed that the creche in a traditional Christmas setting was a dominantly religious symbol. The dissent emphasized the City's employment in its celebration of all the conventional symbolism of the Christmas season and concluded that in context the passive display of the nativity scene is "prototypically symbolic of Christmas" and that the figures in the creche "simply contributed to the message that the holiday they represented was at hand." (Cert. Pet. A-17)

From this decision of the Court of Appeals this Court has granted the City's petition for certiorari.

Summary of Argument

Establishment Clause principles define the degree to which government contact with religion is permissible. The removal of all religiosity from government activity is neither practical nor desirable because the religious tradition of the American people is too deeply ingrained in the life of the nation. Government is prohibited from promoting religion. But passive acknowledgment of the religious tradition is not promotion of religion. Religious origins in American culture do not prohibit public observance of contemporary secular events which de-

rive from those religious origins. *McGowan* v. *Maryland*, 366 U.S. 420 (1960). Where the secular aspects of an activity dominate the religious aspects, a government may engage in such activity without offending the Establishment Clause. The underlying constitutional standard is whether government is conducting a secular activity or a religious exercise.

Government celebration of Christmas is a secular activity. The American Christmas is a national folk festival which derives from the Christian celebration of the nativity. Although the nativity theme has not disappeared from the contemporary observance, it has been heavily overshadowed by the secular components of the national festival. Most of the modern secularity in Christmas is traceable, one way or another, to religious roots. But the contemporary festival is a vast conglomeration of folk customs and symbols, feasting and fraternizing, music, literature and art. The religious origins in the holiday have evolved into a secular humanism and the nativity scene has evolved into a major element of the artistic component of the national festival.

The City's Christmas observance in this case is completely typical of the American folk festival. It is heavily secular in tone and content. The creche is one symbol among Santas and reindeer, Old English figurines, snowmen, cartoon character cut-outs, trees, lights, bells, candles and stars. There are Christmas carols, parties, free candy and carousel rides. The entire observance is a melange of the familiar trappings of the American Christmas season.

Under the decisions of this Court the tri-partite test must be applied to the entire governmental activity and not merely to a single religious element in that activity. The issue in this case is whether the City's celebration of Christmas is a dominantly religious or a dominantly secular activity. Each component of government activity is merely a part of the whole and if the tri-partite test is not applied to the entire activity, the constitu-

tional principles will become distorted. In this case, the City is no more sponsoring a creche than it is sponsoring a snowman, a Christmas tree, a Santa Claus, or a wishing well: it is sponsoring all of these and much more as part of an integrated celebration of a legitimate national holiday. If the sponsorship of the creche were to be invalid under the *Lemon* tri-partite test, it could only be because the creche makes the entire celebration a religious activity. The creche is part of the City's celebration because the nativity theme is part of the modern secular American Christmas.

The sponsorship of the creche is not—contrary to the conclusion of the Court of Appeals—a religiously discriminatory action. *Larson* v. *Valente, supra,* does not apply herein because the decision in that case was premised upon the existence of facial discrimination. Where, as in this case, the character of the government activity is in dispute, it is the *Lemon* tri-partite test which must measure the activity against Establishment Clause values. This was implicitly conceded by the Court of Appeals in its use of the *Lemon* test to apply its strict scrutiny analysis purportedly following *Larson* v. *Valente, supra.*

The City's Christmas celebration does not violate the *Lemon* test. The government action has a secular purpose of joining with the community in celebrating the national legal holiday of Christmas. The passive inclusion of those symbols, both secular and sectarian, which are traditionally associated with the American folk festival of Christmas does not result in the advancement or inhibition of religion. Since the government activity is secular and since it does not conduct that activity in affiliation with any outside religious group, its Christmas celebration does not involve entanglement with religion.

Argument

I. The City's Passive Display of a Creche as Part of a Dominantly Secular Christmas Celebration Does Not Constitute an Establishment of Religion.

This Court has consistently declared that religion—by history and tradition—is too far woven into the fabric of American culture to expect or permit the Establishment Clause to isolate completely government from religion. Some contact between the two is inevitable, and it is the nature and extent of that contact which implicates First Amendment principles. The identification of religiosity in public activities only begins the constitutional inquiry rather than ending it. Much of the secular content in contemporary American institutions and traditions derives from roots which were wholly or partly religious. Government contact with those institutions and traditions could be religiously sterile only if government aggressively rooted out from its activities all incidents of religious origin, and this Court has often held that such is not required by the Establishment Clause. Neutrality toward religion and not hostility is the governing constitutional value. Secular and not religious activities are the business of government.

A. *Establishment Clause Principles Do Not Prohibit a Public Observance of Christmas Which Includes Acknowledgment of the Nativity Theme in the Holiday Tradition.*

In *McGowan* v. *Maryland*, *supra*, this Court sustained the constitutionality of Sunday closing laws. The laws unquestionably gave some benefit to religion[1] and, just as unquestionably, had their origin in dominantly religious tradi-

[1] One undeniable result of Sunday closing laws is "...to render it somewhat more likely that citizens would respect religious institutions and even attend religious services...." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 776 (1973).

tion. But since their contemporary content was mainly secular, their religious origin and religious benefits did not amount to an establishment of religion. In upholding those laws, this Court, at 333 U.S. 445, stated:

> "To say that the States cannot proscribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."

The intertwining of religious tradition and secular observance is a fact of American life. Accepting the legalization of Sunday as a day of rest does not require the pretense that Sunday is not also a religious day. But as long as the secular element is dominant, government action is not rendered constitutionally infirm by the presence of some religious implications.[2] The principled approach to Establishment Clause doctrine recognizes that it is simply not possible to eliminate all incidents of religious tradition without simultaneously obstructing legitimate government activity.[3]

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[2] In his concurring opinion in *McGowan*, Justice Frankfurter observed, at 366 U.S. 503, 504: "... Cultural history establishes not a few practices and prohibitions religious in origin which are retained as secular institutions and ways long after their religious sanctions and justifications are gone...."

[3] In a separate opinion in *McCollum* v. *Board of Education*, 333 U.S. 203, 235, 236 (1948), Justice Jackson stated: "... But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture without the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet, the inspirational appeal of religion in these cases is often stronger than a forthright sermon.... Certainly, a course in English literature that omitted the Bible and other beautiful uses of our mother tongue for religious ends would be pretty barren.... The fact is that, for good or for ill, nearly everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples."

Given the religious threads in American history and culture, some accommodation by government to religion is both inevitable and permissible under the First Amendment. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court held that public school systems could adopt cooperative programs to permit private schools to conduct religious education. Religion is the clear beneficiary of such programs, but that fact does not make the government action promotional of religion. Government may merely acknowledge, without sponsorship, the religiosity of the American people. In *Zorach*, this Court, at 343 U.S. 313, said:

> "We are a religious people whose institutions presuppose a Supreme Being."

Failure to permit public recognition of the religious element in American life would "...read into the Bill of Rights...a philosophy of hostility to religion." 343 U.S. 313. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), this principle was reiterated at 374 U.S. 212, 213:

> "It is true that religion has been closely identified with our history and government. As we said in *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962): 'The history of man is inseparable from the history of religion...' The fact that the Founding Fathers believed devotedly that there was a God and that the inalienable rights of man were rooted in Him is clearly evidenced in their writings from the Mayflower Compact to the Constitution itself.... It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people...."

The constitutional line drawn by *Zorach* v. *Clauson*, *supra*, is a line between active government promotion of religion on the one hand, and passive government recognition of religion on the other. Compare *McCollum* v. *Board of Education*, *supra*. This line has been consistently adhered to by this Court.

Government may not financially aid institutions which are so permeated with religiosity that the aid inevitably reaches the religious function. *Lemon* v. *Kurtzman*, *supra*; *Meek* v. *Pittenger*, 421 U.S. 349 (1975). At the same time, however, aid to religious institutions whose secular function is separable is not an establishment of religion if the aid is confined to the secular activity. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). Religious materials may not be used in public elementary schools for religious exercises, but those same materials can properly be presented for secular educational purposes if their instructional objectivity is preserved. *Abington School District* v. *Schempp*, *supra*.[4] Since religiosity

[4] In *Abington School District* v. *Schempp*, *supra*, Justice Brennan's concurring opinion stated as follows, 374 U.S. 303, 304: "...As we said in *McGowan* v. *Maryland*, 366 U.S. 420, 442, 'the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.'...This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus, reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." The use of the creche in the subject holiday celebration merely recognizes the fact that the American folk celebration of Christmas originated for many as a commemoration of an historical event. Thus, including the creche in a secular celebration of the legal holiday of Christmas is no more of a religious exercise than the singing at state-sponsored functions of the second verse of "The Battle Hymn of the Republic," which contains an allusion to the same historical event. In *Engel* v. *Vitale*, *supra*, at 370 U.S. 435, n. 21, this Court was careful to note: "There is, of course, nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's expression of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

is a matter of degree, the permissibility of government contact depends to a considerable extent upon the remoteness or the immediacy of the religious element impacted by the government action. *Hunt* v. *McNair*, 413 U.S. 734 (1973).[5]

Critical to any constitutional examination of government action which is impacted by religiosity is the context within which the religious component is introduced. Although some study of the Bible or of the Ten Commandments can be a legitimate function of public education, the manner in which it is presented determines its neutrality. *Abington School District* v. *Schempp*, *supra*; *Stone* v. *Graham*, 449 U.S. 39 (1980).[6] If the religious component in American culture is singled out by government to be offered for its religious significance, then government is promoting the religiosity. *Engel* v. *Vitale*, 370 U.S. 421 (1962). But if the context is secular and the accommodation to religion is passive, the test of neutrality has been met. *McGowan* v. *Maryland*, *supra*; *Zorach* v. *Clauson*, *supra*. At root, the Establishment Clause issue in any case is whether the basic content of the governmental activity is secular or religious, and that issue can only be resolved with reference to the context in which the activity takes place.

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[5] In *Committee for Public Education* v. *Nyquist*, *supra*, at 413 U.S. 760, this Court declared: "... Yet, despite Madison's admonition and the 'sweep of the absolute prohibitions' of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under the Clauses have presented some of the most perplexing questions to come before this Court."

[6] The opinion of the District Court herein rejected this portion of the City's position by concluding that, "... This argument would permit government to teach the religious message of the Bible because that document also has literary, social and historical value." (Cert. Pet. A-43) But any exposition of the Bible inevitably introduces its religious message, and only the context of its presentation can preserve its objectivity. For example, Chapter One of the Book of Genesis categorically asserts that God created the world, and that assertion is an inevitable incident of any presentation of that material. Its literary, social, and historical value neutralizes its religious content but certainly cannot remove that content.

Public observance of legal holidays implicates the principles of government accommodation to religion which have been invoked by this Court. The national legal observance of Thanksgiving Day is a secular public activity traceable to an historically religious event.[7] Its religious content is historical fact, and its secularization is contemporary fact.[8] If government can constitutionally observe the holiday, it is because, like Sunday, its religious past has been submerged in its present secular character, and that secular character is an independent justification for its contemporary recognition. The decisions below have held that government may observe the Christmas holiday only by expunging from its observance all evidence of its religious tradition.[9] Petitioners submit that the Establishment Clause as applied by this Court does not justify

[7] In *Zorach* v. *Clauson*, *supra*, this Court took note of the religious content of the Thanksgiving holiday and affirmed the legitimacy of its celebration. At 343 U.S. 312, 313, the Court stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.... Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'So help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies, would be flouting the First Amendment...."

[8] When President Lincoln revived the Thanksgiving holiday first established by President Washington, he stated: "Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do by this my proclamation designate and set apart Thursday, the 30th day of April, 1863, as a day of national humiliation, fasting, and prayer. And I do hereby request all the people to abstain on that day from their ordinary secular pursuits, and to unite at their several places of public worship and their respective homes in keeping the day holy to the Lord and devoted to the humble discharge of the religious duties proper to that solemn occasion." *Messages and Papers of the Presidents*, Bureau of National Literature, Inc., 1897, Vol. VIII, p. 3368; see also Vol. I, p. 56.

[9] As the dissenting opinion below points out, it would not be possible to remove all religious content from Christmas unless its name were changed and its customary celebration (e.g. the playing of carols) significantly altered. See *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 449 U.S. 987 (1980).

such a result and that such a requirement would convert the principle of neutrality into a principle of hostility.[10]

The American Christmas celebration is a national folk festival rooted in the biblical story of the nativity but with secular characteristics which have dominated for at least a century.[11] The folk aspects of the American Christmas began to emerge in the early part of the last century.[12] Many of its customs and symbols are borrowed from European countries.[13] But the American Christmas is distinctive and indigenous.[14]

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[10] Petitioners submit that any benefit to religion resulting from a contextually balanced inclusion of a creche in a Christmas display is surely far less than the benefit to religion resulting from Sunday closing laws. See *Giannella*, "Religious Liberty, Non-Establishment and Doctrinal Development, Part II, the Non-Establishment Principle," 81 Harv. L. Rev. 513, 532 (1968).

[11] "Thus by the latter part of the last century, the folk-secular aspects of Christmas were taking precedence over its religions ones." Barnett, *The American Christmas*, The MacMillan Company, 1954, p. 23. But even earlier, secularization had begun to crowd out the religious elements of the holiday celebration. The same author, at p. 6, observes: "In 1827 Bishop Chase, an Episcopalian, wrote to his wife: 'The devil has stolen from us ... Christmas, the day of our spiritual redemption and converted it into a day of wordly festivity, shooting and swearing.' His words were prophetic of the increasing secularization of Christmas which occurred in the United States during that century. In an indirect way this process was probably influenced by the separation of church and state established by the American Constitution in 1791. Because of this, members of the Puritan and evangelical churches were less inclined to oppose the secular celebration when it no longer symbolized the religious and political dominance of the Church of England. This tolerance increased during the nineteenth century and undoubtedly encouraged popularity of the folk festival."

[12] "In the first half of the nineteenth century, the Sunday school was initiated in this country. Christmas celebrations held in these schools did much to promote the general acceptance of folk customs, such as the use of the Christmas tree and Santa Claus." Meyers, *Celebrations: The Complete Book of American Holidays*, Doubleday & Company, Inc., 1972, p. 315.

[13] Miles, *Christmas Customs and Traditions*, Dover Publications, Inc., 1976. (republication of 1912 original)

[14] "Another powerful force which supports the American Christmas cult is the belief that it is a vital and unique symbol of our national life and culture. Significantly, this view prevails both in the United States and in other countries. This is especially true of the folk Christmas, which reflects American secular culture more extensively than does religious observance of the occasion. It has become so intimately identified with national life that adoption

Its multi-faceted themes are interwoven into a unitary celebration of colorful diversity.[15] Christmas carols and the writings of Dickens, Santa Claus and his reindeer (including the still developing legend of Rudolph), gift giving and Christmas cards, special food and drink, trees, candles, holly, mistletoe, and poinsettia — all of these and more are identified (together with the creche) in the distinctively American celebration. It is because of this mix that Christmas is a legitimate legal holiday.[16] The creche is not foreign to it or separate from it, but rather, it is an integrated part of the whole.[17]

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of the Santa Claus figure, the Christmas tree, and gift exchanging now demonstrate an important stage of acculturation for recent immigrants. Americans also show a pronounced inclination to believe that Christmas, in some form, is celebrated by all people of the world. This is simply not true, and the belief clearly indicates an unconscious attempt to generalize from our own national festival." Barnett, *supra*, pp. 141-142

[15] In his concurring opinion in the Court of Appeals, Judge Bownes, having reference in part to Meyers, *supra*, notes a few of the secular themes, e.g., Dickens, the Christmas tree, and Santa Claus. (Cert. Pet. A-15). The complete listing of headings and subheadings in Meyers, *supra* (pp. 309-344), in order, is as follows: Mithraic Influences on Christmas; The Saturnalia of Rome; Puritan Opposition to Christmas; Christmas in the New World; A More Joyous Approach; Growth of Christmas Celebrations; Christmas Follows the Frontier; Legal Recognition of Christmas; St. Nicholas; Kriss Kringle; the Cartoon Contribution of Thomas Nast; Christmas Carols; The Custom of Caroling; Amahl and the Night Visitors; Yule and the Yule Log; Burning of the Yule Log; Christmas Candles; Christmas Cards; Christmas Greeting Cards Reach America; Christmas Foods; Feasting in America; Mince Pie and Plum Pudding; Christmas Cheer: The Wassail Bowl; Cookies; The Creche; The Christmas Tree; Christmas Tree in America; The Various Ways of Ornamentation; The Tree's Popularity in Europe; Lighting Up the Modern Tree; Christmas Greenery; General Customs Relating to Greenery; Holly; Mistletoe; The Poinsettia; Rosemary; Laurel; Christmas Superstitions and Miscellaneous Customs; Animal Superstitions; Weather Predictions; Other Christmas Beliefs; The Custom of Mumming; Gift-Giving and the Christmas Spirit. The author's placing of "The Creche" between "Cookies" and "The Christmas Tree" scarcely accords a dominating religious significance to that symbol.

[16] See, e.g., 5 U.S.C. Section 6103 R.I. Gen. Laws, 1956, 1979 reenactment, Section 25-1-1.

[17] In its opinion, the District Court said that there are "two Christmases", one the secular and the other religious. "Janus-like, it is one holiday with two distinct and very different faces." (Cert. Pet. A-41) It is respectfully submit-

What has evolved in the American tradition from the religious theme of Christmas is a general humanistic tone of brotherhood, private charity, and good will.[18] Although this humanism is derivative from the religiosity, it is now totally independent of it and constitutes a major modern secular theme of the American Christmas.[19] So, too, the nativity scene has developed into a component of Christmas art, which is an

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ted that such an analysis is unrealistic. The fact of the matter is that "... the past and the present, the religious and the secular, are fused in the pattern of the national festival so that it draws vitality from many and varied sources. This has given the celebration an appeal that often transcends the restrictions of belonging to certain age, sex, religious, and economic groups, and promotes a wider sense of human brotherhood." Barnett, *supra*, pp. 145, 146. Christmas is no more "Janus-like" than is Sunday or Thanksgiving Day, currently secular observances with religious origins and residual religious characteristics.

[18] "Soon, 'good will toward men' and 'alms to the needy' became the melody of 'the Christmas carol,' a theme quite in harmony with growing skepticisms, growing populations, industrial expansion, and the new *liberte, fraternite, et egalite*. Social concern was elbowing out adoration as the major concern of man, and a new sort of mid-winter rite had arrived, its spirit centered on the fortunes of Tiny Tim and the reformed Scrooge; on the *New York Times* '100 Neediest Families'; on Woody Guthrie's Pretty Boy Floyd who responds to slurs that he's 'an outlaw' and 'a thief' with the rebuttal, 'Well, here's a Christmas dinner for the families on relief.' " Coffin, *The Book of Christmas Folklore*, The Seabury Press, 1973, p. 16. The theme of peace, also evoked from the religious roots, is a strong element in the contemporary humanism of Christmas. See, e.g., *Eleanor Roosevelt's Christmas Book*, Dodd, Mead & Company, 1963.

[19] "The giving and receiving of gifts turned into an integral part of the season when the Christkindl became Kriss Kringle and Sinterklass was anglicized into Santa Claus, and the two became identical in the popular mind as a symbol of the generosity of the Christmas spirit." Meyers, *supra*, p. 344. The District Court concluded that the good will value in the Christmas tradition, even though secular, was not dominant, because it "flows from", the fundamental religious significance of Christmas. (Cert. Pet. A-48) But it is respectfully submitted that all contemporary secularization which has a religious origin "flows from" its religious background. The observance of Sunday as a day of rest was an historical outgrowth of the day's religious observance. And the contemporary Thanksgiving Day celebration originated in a religious event, but it is the contemporary secularity and not its religious origin which determines the character of its present observance. The fact is that the dominant themes of the modern American Christmas are brotherhood, family life, private charity, and commercialism.

important element in the national festival.[20] Both the humanistic quality of the contemporary celebration and the artistic employment of the nativity scene represent the secularization of the religious origins of the holiday. Religious traditions have survived in the celebration of many American ethnic groups, but those traditions have merged into the dominantly secular modern national festival.[21]

The record in this case shows a completely typical American Christmas celebration. The City-sponsored holiday activities are spread out at four locations.[22] Santa Claus presides over free rides at the carousel in the municipal park.[23] The City Hall is decorated and lighted.[24] The municipal ice rink is decorated and is the site for a Christmas party for the mentally retarded.[25] There is caroling.[26] The Hodgson Park display (where the creche is located) has a live Santa Claus who distributes candy after arriving on a fire truck.[27] The Hodgson

[20] "Festivals are preserved through art forms, and Christmas has accumulated a rich and distinctive body of songs, stories, poems, pictures, and plays. These embody its traditions and meanings and transmit them from generation to generation. In this country they also mirror important episodes in the development of the festival and reveal the steady growth of secular influences in the national Christmas. . . . The major portion of traditional Christmas art has long been concerned with the Nativity theme, and this fact probably retarded its development somewhat in the United States." Barnett, *supra*, p.102.

[21] "Much of the emphasis on profound worship that now shows itself in the American Christmas owes its vigor not to the mainstream English stock, but to later immigrants, to the Catholic Irish, Italians, Slavs, Poles, and Latins, to the Lutheran Germans, who have come from areas where the medieval concept of the Christmas holyday was never assaulted as it was in Anglican lands. With their pyramids of candles, their creches, poinsettias, and *tannenbaums*, they have brought back into the commemoration a wonder that had almost disappeared. As they have shared their ways with their English neighbors, intermarried, and demanded attention, the Christmas of late twentieth-century America has crystallized—an incredible mix of Mass and the masses, miracles and eggnog, camels and reindeer, ecstasy and commercial agony undreamed of in the *auld lang syne*." Coffin, *supra*, p. 16. And the unmistakable commercialism of the contemporary Christmas in the United States adds significantly to the secularity of the holiday. Barnett, *supra*, Chapter IV, pp. 79-101.

[22] (J.A. 52, 53)

[23] (J.A. 53)

[24] (J.A. 52, 53)

[25] (J.A. 53)

[26] (J.A. 53)

[27] (J.A. 52, 53)

Park display itself is a potpourri of American Christmas symbolism: lights, trees, snowmen, Santas, reindeer, a variety of figurines, stars, and bells.[28] The solitary trace of religiosity in the entire municipal celebration is the creche. In its context it is a passive and non-promotional acknowledgment that the nativity is one of the roots in the American Christmas tradition. The role of the creche in the City's Christmas celebration is no different in kind or in degree from the role of religion in the holiday itself.[29] Many of the contemporary symbols of Christmas once had religious significance.[30] Of all the Christmas symbols, the creche alone retains some religious significance in a religious setting, but in the context of a conventional Christmas display, even the creche is still primarily a symbol of the Christmas season.[31] The presence of the creche

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[28] (J.A. 40, 47, 51, 52)

[29] See *Allen* v. *Morton*, 495 F.2d 64 (1973). The District Court in this case expressed suspicion that the cultural and traditional use of the nativity as a holiday symbol was really a disguise for promoting its "fundamentally theological message." (Cert. Pet. A-55) But on the record in this case, it is submitted that the "disguise" is so overwhelmingly secular as to render the religious message virtually indecipherable. There is a religious "message" in the mere acknowledgment of Thanksgiving Day, but that message is effectively lost in the holiday's contemporary celebration.

[30] The "Paradise Tree," introduced by Christians in the fifteenth or sixteenth century, was the progenitor of the modern Christmas tree. The familiar Christmas star derived from the Star of Bethlehem. Santa Claus is the modern version of St. Nicholas, a fourteenth century archbishop, whose church vestments are responsible for the familiar red and white Santa suit. Holly was introduced as a liturgical symbol. Coffin, *supra*, pp. 19, 22, 76; Meyers, *supra*, pp. 328, 331, 332, 336; Miles, *supra*, pp. 271, 275.

[31] In its opinion, the District Court stated: "In sum, the Court does not understand what meaning the creche, as a symbol, can have other than a religious meaning." (Cert. Pet. A-47) However, as the dissenting opinion below pointed out, "...but creches and Santas in December are as typically symbolic of Christmas as turkeys and pilgrims in November are symbolic of Thanksgiving." (Cert. Pet. A-18) Where the character of the governmental action is ambiguous, there is no Establishment Clause violation. Tribe, American Constitutional Law, The Foundation Press, Inc., 1978, pp. 827-829. At p. 828, the author asserts: "...Thus, when a government program has the effect of fostering, tolerating, or encouraging—but not mandating—an activity, the fact that the activity is only *arguably* religious is *not* enough to make the government program a violation of the establishment clause; as long as the activity is arguably *not* religious, the establishment clause has not been violated by its facilitation. ..." (emphasis in original)

in the Christmas celebration—without comment and without use in a religious exercise—simply acknowledges one element of the American Christmas tradition in a manner which makes no attempt to promote such religious content as it might contain in other settings.

The City's celebration of Christmas is a secular activity as the Christmas holiday is itself secular. The inclusion of a creche in one portion of that celebration no more converts the activity into a promotion of religion than does the title of the Christmas holiday convert its legalization into a governmental religious observance. There is religiosity in Christmas as there is religiosity in Sunday and in Thanksgiving, but that religiosity is overshadowed by a dominant secularization. The Establishment Clause decisions of this Court do not require government to eradicate all religious components in a secular activity. To the extent that the nativity theme is historically part of the secular American Christmas its passive acknowledgment by government is not an establishment of religion. To prohibit such passive acknowledgment would subvert rather than promote the values of the Clause.

B. *The City's Christmas Celebration Is Not a Religiously Discriminatory Action Requiring Strict Scrutiny and a Compelling Justification.*

In *Larson* v. *Valente*, *supra*, this Court invalidated a portion of a Minnesota statute dealing with registration and reporting requirements for charitable organizations. While requiring charitable institutions to register and report contributions, the statute exempted those religious organizations which obtain more than 50% of their total contributions from members or affiliated groups. The decision concluded that the statute was facially discriminatory against certain churches placing not insignificant burdens on some and according not insignificant benefits to others. As a result of this facial discrimination, the statute was held to be suspect thus requiring strict scrutiny and

the establishment of a compelling state interest for its justification. Concluding that the statutory provisions were not closely fitted to protection of the asserted compelling interest, this Court held that the statute violated the Establishment Clause.

In the case at bar, the Court of Appeals held that *Larson* v. *Valente*, *supra*, applied to the City's Christmas celebration because "...the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions...". (Cert. Pet. A-11) Adopting the conclusion of the District Court that the City's sponsorship lacked a secular purpose, the Court of Appeals concluded that *a fortiori* there could be no compelling state interest in an activity impelled by a religious purpose. The essence of the Court of Appeals decision is that the role of the nativity makes the contemporary celebration of Christmas suspect because the nativity theme is discriminatory and, therefore, public observance of Christmas must eliminate the nativity scene.

In *Larson* v. *Valente*, *supra*, this Court stated that "...the *Lemon* tests...do reflect the same concerns that warranted the application of strict scrutiny to [the Minnesota statute]...". 456 U.S. 252, 102 S.Ct. 1678. More specifically, the decision concluded: "It is plain that the principal effect of the 50% rule...is to impose the registration and reporting requirements of the act on some religious organizations but not on others." 456 U.S. 252, 102 S.Ct. 1678. It was because the statute was facially discriminatory among churches that "strict scrutiny" was required to determine whether it could be justified.

In this case, however, it is the facial impact of the City's action which is in issue. If the City's action is the secular celebration of a legitimate national holiday, there clearly is no facial religious discrimination in that action. The determination of the character of the governmental activity has been made by this Court through the application of the *Lemon* tri-partite test. *Conrad* v. *City and County of Denver*,

__ Colo. __, 656 P.2d 662 (1982).[32]. Thus, what was the premise for the application of strict scrutiny in *Larson* v. *Valente, supra*, is the issue to be determined herein.

The Court of Appeals in its decision in this case applied strict scrutiny through adoption of the District Court conclusion that the first part of the *Lemon* test had been violated. Its reasoning was that since the City's sponsorship of the creche had no secular purpose, "...it follows inexorably that defendants established no compelling government interest in erection of the nativity scene." (Cert. Pet. A-12) But its application of strict scrutiny was premised upon the unelaborated assertion that the City's sponsorship was discriminatory. (Cert. Pet. A-11) That assertion appears to have been based upon the Court's conclusion that the City's sponsorship lacked a secular purpose under the *Lemon* test. Thus the decision of the Court of Appeals reached its strict scrutiny analysis only after applying the tri-partite test and concluding that it had been violated.

This Court has made clear that the application of Establishment Clause principles to government action is not dependent upon or limited to any single test. The tests are but guidelines for the application of the principles. In *Meek* v. *Pittenger, supra*, at 421 U.S. 358, 359, the relationship of the *Lemon* tests to the constitutional principles was described as follows:

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[32] *Conrad* v. *City and County of Denver, supra*, dealt with a challenge to the use of a creche in the Christmas celebration of the City of Denver. The Supreme Court of Colorado held that *Larson* v. *Valente, supra*, was inapplicable because the facial character of the Christmas display was the matter in dispute. At 656 P. 2d 672 the Court stated: "While the strict scrutiny test applied in *Larson* v. *Valente* was not designed to aid in the sensitive line-drawing process necessary to determine whether particular governmental activity constitutes unconstitutional preferential treatment of religion, we believe that the test set forth in *Lemon* v. *Kurtzman, supra*, was specifically formulated for this purpose. Recognizing that the Establishment Clause does not contain 'precisely stated constitutional prohibitions,' the United States Supreme Court formulated the three-part test in *Lemon* v. *Kurtzman* with reference to the 'three main evils against which the Establishment Clause was intended to afford protection' to aid in determining whether particular governmental conduct crosses the line into the zone of forbidden activity. . . ."

> "These tests constitute a convenient, accurate distillation of this Court's efforts over the past decade to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws 'respecting an establishment of religion' and thus provide the proper framework of analysis for the issues presented in the case before us. It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."

Since the premise of the Court of Appeals' decision in employing strict scrutiny was that the governmental action was religiously discriminatory, that decision both implicitly and explicitly required the application of the tri-partite test. Thus, it is the application of that test which is necesary for an accurate constitutional analysis of the issue presented in this case.

C. *The Inclusion of a Creche in a Traditional and Diverse Public Christmas Celebration Has a Secular Purpose, Has No Primary Religious Effects, and Does Not Foster Excessive Entanglements.*

The settled framework for the application of the Establishment Clause to government action is the tri-partite test: (1) the action must have a secular purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster excessive governmental entanglement with religion. *Lemon* v. *Kurtzman, supra.* The parts of the test are no more than "helpful signposts" for implementation of the Establishment Clause. *Hunt* v. *McNair*, 413 U.S. 734, 741. In this case, the District Court held that the City's inclusion of the nativity scene in its Christmas celebration violated

each portion of the tri-partite test. The Court of Appeals agreed with the District Court and adopted its reasoning with respect to the purpose and effect portions of the test but did not affirm the District Court's conclusion as to entanglement.

Applying the Test

It is respectfully submitted that the basic fallacy in the decisions below lies in their isolated treatment of the creche as a dominantly religious symbol. On the record in this case, the simple fact is that the City is not sponsoring a creche but rather is sponsoring a Christmas celebration, a small portion of which includes a creche. The creche is part of the municipal Christmas celebration because it is a part of Christmas, and to examine the sponsorship of the creche as an isolated activity is an unrealistic assessment of what the City is doing. The sponsorship of the creche has no independent purpose or effect; it merely subserves the large purpose and effect of the municipally-sponsored holiday observance. It is surrounded by a plethora of secular holiday symbols. The display of which it is a part is maintained on the grounds of a museum in a commercial area in close proximity to the City Hall, which is also decorated in a Christmas motif. Christmas music is played both at the Hodgson Park display and at City Hall. The objective and function of the creche can only be determined in the context of its environment and in the context of the City's celebration of Christmas.[33]

[33] The District Court opinion stated that the City's argument "overstates" the role of context in applying the tri-partite test. (Cert. Pet. A-51). It is respectfully submitted that under all of the decisions of this Court, it is difficult, if not impossible, to overstate the importance of context, because it is the context which gives meaning and content to the government action. In *Abington School District* v. *Schempp*, at 374 U.S. 225, this Court stated: "...Nothing we have held here indicates that such study of the Bible or of religion, when presented objectively *as part of a secular program* of education may not be effected consistently with the First Amendment." (emphasis added) The decisions of this Court have made it clear that the degree of secularity inhering in the government action as a whole principally determines the application of the tri-partite test.

In *Stone* v. *Graham*, 449 U.S. 39 (1980), this Court invalidated a statute mandating the posting of the Ten Commandments in public schools. This Court concluded that the "... pre-eminent purpose for posting the Ten Commandments on school-room walls is plainly religious in nature." But in so doing, this Court emphasized the importance of context in the application of the tri-partite test:

> "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like... Posting of religious texts on the walls serves no such educational function...".

This Court explicitly recognized in *Stone* that the function of the display could only be ascertained from its setting, and isolated as it was in the context of a public school classroom, its religiosity predominated. It is the contextual isolation of the religiosity which accentuates the promotionalism in the government conduct. *Engel* v. *Vitale*, *supra*. This is especially true of symbolism which necessarily achieves an impression by drawing upon its setting.

In ascertaining the purpose and effect of the City's conduct in this case, it is just as arbitrary to isolate the nativity scene from the Christmas celebration as it would be to isolate the individual items in the nativity scene from each other. A small manger in and of itself has no religious significance. Nor does a figurine of a sheep or a king or a shepherd. Obviously, however, these gain meaning only by being integrated into the scene of which they are component parts. Their meaning is in their context. In applying the tri-partite test, the same is true of the Christmas display of which the creche is a part and the Christmas celebration of which the display is a part. Through

integration with each other, the items in the creche represent the nativity scene, and through integration with all of the other symbolism, the nativity scene represents a public celebration of the national festival of Christmas.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court applied the tri-partite test to the use by students of public university facilities for the purposes of religious worship. This Court expressly rejected the argument that the tri-partite test should be applied to the religious exercises which the students desired to conduct. Rather, it was held that the appropriate focus for the application of the tri-partite test was the university's generalized policy of making its facilities available to student groups. In so holding, this Court, at 454 U.S. 263 at 273, 275, said:

> "The university's argument misconceives the nature of this case. The question is not whether the creation of the religious forum would violate the Establishment Clause. The university has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech...
>
> "...At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect'."

As *Widmar* demonstrates, if challenged government action is not placed in its fair and realistic context, the application of Establishment Clause values can become distorted. In that case, the university's permission for the religious use of its facilities could not be viewed in isolation, because that would not represent an accurate picture of what the university was doing. Only by relating the specific student request to the university's policy with respect to other student requests for

facility use could the tri-partite test receive a meaningful application. Disregard of context defeats the purpose of the tri-partite test, because it assumes that the religious element in a government program is the only relevant point of inquiry for Establishment Clause purposes.

In the case at bar, examination of the creche out of its context will inevitably produce a distorted application of the *Lemon* test. Such an examination assumes either (1) that the only part of the governmental action which is constitutionally significant is the creche itself or (2) that the inherent religiosity of the nativity scene so overpowers the secular elements of the City's Christmas celebration as to make them irrelevant to the constitutional issue. On either assumption, the test is not being applied to the entire municipal activity, and it is for that reason as defective an application as that advanced by the university in *Widmar* v. *Vincent*, *supra*, and rejected by this Court.

The basic question to be determined by the application of the tri-partite test to the facts of this case is whether the City is promoting religion or is simply celebrating Christmas. That question can only be answered by relating the sponsorship of the creche to the City's sponsorship of its Christmas celebration. If a creche in its setting gave to a Christmas celebration a dominant and promotional religious content, then the celebration might not pass muster under the tri-partite test. But if the celebration as a whole, including the creche, retains a dominant secular tone as a traditional holiday observance, then the application of the tri-partite test will not result in an Establishment Clause violation. It is submitted that on the record in this case, the City's Christmas celebration is clearly secular, and the inclusion of the creche does nothing to alter that conclusion.

Secular Purpose

The City has asserted a series of purposes for its Christmas observance, the first of which is the advancement of the holiday tradition.[34] Secondarily, the celebration is part of ongoing efforts to promote the central City area as an attraction for the public and, more specifically, to promote retail activity during the Christmas season.[35] There is a consistent municipal policy of celebrating national holidays which is implemented by the sponsorship of parades on Veterans' Day and Memorial Day and of a fireworks display on the Fourth of July.[36] The Christmas activities are connected with this holiday policy. In addition, other promotional celebrations are conducted in the downtown area at other times during the year.[37] Considerable effort and financial resources have been devoted in recent years to the development of the central City, and the various promotional activities have been coordinated with those efforts.[38]

The existence of a legitimate secular purpose may exist even where there is an admittedly religious background for the governmental action. *McGowan* v. *Maryland*, *supra*. In the case of financial aid to religiously permeated institutions, the promotion of educational objectives has been held by this Court to constitute valid secular purpose. *Committee for Public Education* v. *Nyquist*, *supra*; *Lemon* v. *Kurtzman*, *supra*; *Meek* v. *Pittenger*, *supra*. Only where the government sponsorship is totally lacking a secular motivation will it be invalidated under the first portion of the tri-partite test. *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Abington School District* v. *Schempp*, *supra*; *Stone* v. *Graham*, *supra*. Even a direct and substantial benefit to religion may have a legitimate

[34] (J.A. 109)
[35] (J.A. 107, 110, 111)
[36] (J.A. 54, 110, 111)
[37] (J.A. 110, 111)
[38] (J.A. 110, 111)

secular purpose. *Larkin* v. *Grendel's Den, Inc.*, U.S. , 102, S.Ct. 1765 (1982) And this Court has specifically held that the presence in the public activity of non-religious elements confirms and strengthens the assertion of a secular purpose. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

In this case, the City's policy of celebrating public holidays is sufficient secular purpose in itself. If the legislature can validly declare Christmas to be a legal holiday, then government should be able to celebrate it as such. The fact that the City also celebrates Veterans' Day, Memorial Day, and the Fourth of July gives further substance to the credibility of the stated purpose. In addition to the holiday celebration itself, however, there are additional purposes put forth by the City which would in any event satisfy the first prong of the tripartite test. Promotional development of the downtown area of the City is unquestionably assisted by colorful displays and decorations which tend to attract the public, and the overall celebration is a direct benefit to the mercantile activities, which are heavily dependent upon the Christmas season for their successful operation.[39]

In *Stone* v. *Graham*, *supra*, this Court held that the mandatory posting of the Ten Commandments in classrooms could have no purpose other than a religious one. But in so holding, this Court emphasized that it was not the religious character of the Ten Commandments which made the public purpose infirm but rather the manner in which the statute required the symbolism to be employed. This Court expressly recognized that had the Ten Commandments been somehow incorporated into the educational function, their use would evidence a legitimate secular purpose. This is consistent with this Court's earlier conclusion that tax exemptions given non-religious institutions supported the legitimacy of the asserted secular purpose in according such exemptions to churches. *Walz* v. *Tax Commission*, *supra*. The nature of the implementation is strong evidence of the real content of the purpose.

[39] (J.A. 132, 133)

In this case, the District Court rejected the City's statement of secular purpose and concluded that the nativity scene in the Christmas celebration was necessarily religious in its objective. The Court of Appeals affirmed this portion of the District Court decision. It is respectfully submitted that this conclusion flows from two errors: (1) the failure to recognize that the creche is one of the symbols of Christmas and (2) the refusal to view the creche as an integrated portion of a larger celebration which serves only the purposes of that larger celebration. Even standing alone, the creche could fail to advance the City's celebrational purpose only if it had no meaning at all as a symbol of Christmas; the objective of observing the Christmas season can be accomplished by employing any legitimate and secular Christmas symbol. More importantly, however, impugning the City's assertion of celebrational and promotional secular purpose requires a disregard of the fact that, except for the creche, the celebration is exclusively secular. The use of the many varied secular symbols is cogent support for the City's position that its objectives are secular. The District Court "readily disposed" of a portion of the City's assertion of purpose by finding that the same purpose could be achieved without the creche.[40] But it is respectfully submitted that such reasoning is convoluted, because the question is not what the purpose would be without the creche but rather what is its purpose as it stands. In its context, the creche serves the same celebrational purpose as all of the other components of the Christmas observance.

If the City were not advancing a secular purpose in this case, it surely would have given vastly different treatment to the religious content in the Christmas holiday. Displaying a solitary creche, overpowering it with secular symbolism, giving no written explanation of its religious background or its

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[40] (Cert. Pet. A-54)

religious content, and failing in any way to use it as part of a ceremony or exercise is hardly consistent with the promotion of a religious objective. The overall tone of the City's Christmas observance belies the existence of a religious purpose. That tone is far more consistent with a policy of celebrating national holidays than it is an attempt to promote or endorse religion. The figures in the creche do no more to advance the City's purpose than do the figures of snowmen, Santa Claus, reindeer, cartoon characters, and all the other symbolism of which the creche figures are a part. As the dissenting opinion below said:

> "Unassociated, as they were, with the performance of any religious rites, the figures did not 'establish' religion in the context in which they were presented. They simply contributed to the message that the holiday they represented was at hand."

Nonreligious Primary Effects

Whatever its purpose, direct government support of an activity which is permeated with religion has a primary effect of advancing religion in violation of the Establishment Clause. *Committee for Public Education* v. *Nyquist, supra; Lemon* v. *Kurtzman, supra; Meek* v. *Pittenger, supra.* So, too, does a direct benefit to religion which constitutes the principal result of the government action. *Larkin* v. *Grendel's Den, Inc. supra.* The religious effects must be both direct and primary.[41] Even though the activity assisted is permeated with religiosity, limited government support palpably secular in nature does

[41] "But an indirect and incidental benefit to religion has never been thought a sufficient effect to warrant the invalidation of a state law." *Committee for Public Education* v. *Nyquist*, 413 U.S. 776.

not have an offending primary effect. *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Board of Education* v. *Allen*, *supra*. Conversly, where the activity supported is not permeated with religion — even though containing religious elements — direct and generalized support for the secular function will not clash with the "primary effects" portion of the tri-partite test. *Hunt* v. *McNair*, *supra*; *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, *supra*. And even where government policy directly results in religious activity, the policy does not have a primary effect of advancing religion unless the religious result is dominating. *Widmar* v. *Vincent*, *supra*.

A major premise of the "primary effects" portion of the test is that some religious content may inhere in government action without offending the First Amendment. Only by relating the religious element to the entire activity can it be determined whether the benefit to religion is disqualifying. Clearly, any government contact with religion gives the public program a religious effect but just as clearly, this Court has held that such a religious effect will not necessarily abridge the Establishment Clause.[42] Only where the religious effect is a primary consequence of the governmental behavior will the tri-partite test be violated. The second major premise of the second part of the test is that not every primary religious effect will necessarily render government action unconstitutional. The effect must be one which either advances or inhibits religion. This, too, recognizes that not all religious content is necessarily promotional or restrictive, and the objective of the Establishment Clause is to prohibit government sponsorship of religion. Thus, the identification of religiosity in public activity triggers inquiry into its extent and its promotional content.

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[42] See Note, "The Establishment Clause, Secondary Religious Effects, and Humanistic Education", 91 Yale L. Journ. 1196 (1982).

Because the degree of religiosity is critical to an ascertainment of "primary" or "incidental" effects, the religious component must necessarily be examined in the light of the attendant secular characteristics of the action. If the religiosity were to be examined in isolation, every religious effect would make the government action infirm. Where the religious component dominates the public action, the only question is whether it advances or inhibits religion. *Larkin* v. *Grendel's Den, Inc., supra.* But where active religiosity is only one of many components of the government program, its relative importance to the program determines whether it is a primary effect. *Widmar* v. *Vincent, supra; Roemer* v. *Board of Public Works, supra.*

Petitioners respectfully submit that the inclusion of the creche in the City's Christmas celebration is neither a primary effect of the governmental action nor an advancement of religion. All of the primary effects of the City's sponsorship relate to the celebration of the national holiday. The function of the creche is likewise to celebrate the holiday, and although in other settings it possesses residual religious content, it does not in its context promote any message other than the observance of the national festival of Christmas. Unless the holiday itself is constitutionally infirm — a proposition not advanced in this case — the effect of the creche is no more primarily promotional of religion than is the legalization of the holiday.

The record in this case shows that the creche represents a small portion of the City's Christmas celebration. In the first place, the Hodgson Park display where the creche is included is only one of four components of the City's Christmas observance.[43] And even in the Hodgson Park display itself, the

[43] (J.A. 52, 53)

nativity scene is a subordinate component.[44] It occupies a relatively small portion of the total park area. It is heavily outnumbered and clearly overshadowed by a host of secular symbols.[45] Even if the creche were an exclusively religious symbol displayed in a manner promoting a religious message, it is such a minor component of the City's Christmas observance that it would not constitute a primary effect of the City's action.

Most of the decisions of this Court relied upon by the courts below in this case dealt with religion in the context of elementary and secondary education.[46] Indeed, the District Court in its discussion of "primary effect" strongly implied that the general public viewing the creche in the City's Christmas display would be in an analogous position to that of the school children involved in *Stone* v. *Graham*, *supra*, and *Abington School District* v. *Schempp*, *supra*.[47] However, this Court has long recognized the importance of the distinction between religious influences in elementary and secondary school settings and in other environments. *Hunt* v. *McNair*,

[44] The District Court in its decision accepted evidence that the nativity scene could be removed from the display without changing the display's impact. (J.A. 133, 139, 140, Cert. Pet. A-54) But since that is so, the creche must necessarily be secondary and incidental. If the purpose and primary effect of the display remain intact without the nativity scene, it is because the purpose and primary effect have little or nothing to do with the creche itself. On the other hand, as a symbol of Christmas the creche contributes to the overall secular purpose and effect of the celebration.

[45] In the Hodgson Park display, the creche is one among the following components: (1) a 40-foot high lighted Christmas tree; (2) a Santa Claus house; (3) a "talking" wishing well; (4) Old English musical group figurines; (5)a large wooden representation of Santa Claus and reindeer; (6) a miniature village in wood; (7) cartoon character cut-outs; (8) a number of wooden representatives of stars and trees: (9) a 48-foot by 4-foot sign which reads "Seasons Greetings"; (10) approximately 2500 colored lights. (J.A. 51, 52)

[46] "Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education." *Committee for Public Education* v. *Nyquist*, 413 U.S. 772.

[47] (Cert. Pet. A-62)

supra, *Tilton* v. *Richardson*, *supra*, *Roemer* v. *Board of Public Works*, *supra*.[48] The effect of religiosity in a university is clearly different from its effect in elementary and secondary schools.[49] On the facts of this case, the creche is being displayed in the presence of lighted Christmas trees, Santa Claus, a wishing well, and a host of diverting Christmas symbolism in an open area in the commercial center of the City frequented to a large degree by Christmas shoppers. The effect of the symbol in those circumstances cannot be compared with the effect it would have completely isolated in a public elementary school classroom.[50] It is respectfully submitted that context is more important in applying the "primary effects" portion of the tri-partite test than it is in applying the other two parts of the test because effect is largely determined by setting and the context makes the symbol what it is. In the case at bar, the context of the City's Christmas celebration makes the creche a holiday symbol.

The District Court acknowledged in its opinion in this case that "... if a 16th century Italian hand-carved nativity scene is included in a City-sponsored museum display of Renaissance objets d'art...", the context would neutralize the religiosity of the symbol.[51] But if that is true, then the same should be true of any generalized display of Christmas symbolism unless the quality of the art determines its effect. The fact is that the nativity scene is part of the artistic texture of the Christmas tradition.[52] The quality of its display does not affect its

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[48] See Tribe, *supra*, p. 825.

[49] In *Widmar* v. *Vincent*, *supra*, this Court pointed out: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion...". 454 U.S. 274, n.14. In this case, adult shoppers and those children whom the adults bring with them should be able to appreciate that the decorations in Hodgson Park are designed to celebrate the Christmas season.

[50] There is, of course, a coercive element in public school attendance. On the other hand, attendance at any part of the municipally-sponsored Christmas celebration in this case is entirely voluntary.

[51] (Cert. Pet. A-52)

[52] See Footnote 20, *supra*.

character as art, and whether it is presented in a classical context in a museum or in a popular context in a public display, its religious content is equally diluted by its setting. If it be conceded that artistic presentation gives dominant secularity to a religious theme, then the form and quality of that presentation can hardly be the measure of its secularity. The fact is that surrounding a creche with all of the secular symbolism of Christmas in the context of a generally secularized Christmas celebration gives the creche the same meaning as is given to the display as a whole.[53]

As pointed out in the dissenting opinion below, the creche is not employed in any kind of religious exercise, nor is it accompanied by any religious message. All of the activities which occur during the City's Christmas observance are purely secular in character: Christmas parties, visits with Santa Claus, and the like. The use of the creche is purely passive. Such religiosity as inheres in the symbol is muted, if not virtually eliminated, by its context. In all of the circumstances of its setting, all that it says is that the Christmas season has arrived. In view of the overwhelming secular character of the City's Christmas celebration, the inclusion of the creche does not constitute a primarily religious effect of advancing religion.

The Absence of Entanglements

The third portion of the tri-partite test advances the principle of neutrality by prohibiting government programs which create certain kinds of ongoing relationships with religion. *Walz* v. *Tax Commission, supra.* In the case of a subsidy to a religiously permeated private institution, a principal objective

[53] "It would be carrying the logic of the primary effect test to an unwarranted extreme to find in this case that appellant's proof that the creche was a patently religious symbol met its burden of showing that the Pageant is 'an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.' " *Allen* v. *Morton*, 495 F.2d 72 (1973)

of the "entanglements" doctrine is to avoid the political divisiveness which arises out of the administration of the program. *Lemon* v. *Kurtzman*, *supra*; *Committee for Public Education* v. *Nyquist*, *supra*.[54] But where the degree of religiosity of the subsidized institution is less pervasive and where its secular function is more readily separable, administrative involvement is permissible without violating the third portion of the tri-partite test. *Tilton* v. *Richardson*, *supra*. In such a case, the problem of political divisiveness does not arise, because the subject matter of the government action is secular and not religious. *Hunt* v. *McNair*, *supra*; *Roemer* v. *Board of Public Works*, *supra*. The political divisiveness which the test seeks to avoid is that which results from making government's contact with religion a subject of recurrent political debate.

In this case, there is no evidence of any outside administrative relationship created by the City in the conduct of its Christmas celebration, and the District Court so found.[55] There was, however, evidence that after this lawsuit was commenced, considerable public controversy arose. In the more than 40-year history of the City's Christmas celebration, including the creche, this was the first time political dispute had ever arisen concerning the City's Christmas observance. The

[54] In *Florey* v. *Sioux Falls School District*, *supra*, at 619 F.2d 1318, the Court of Appeals stated: "All the Supreme Court cases cited by the appellants in support of the 'entanglement' test deal with governmental aid to sectarian institutions, not with the permissible scope of activity in the public schools. In a 'parochaid' case, the court is presented with a situation in which the state is involving itself with a concededly religious activity or institution. The real danger is the potential for state repression of such institutions. In the present case, by contrast, the school district is called upon to determine whether a given activity is religious. This type of decision inheres in every curriculum choice and would be faced by school administrators and teachers even if the rules did not exist. Indeed, the rules are guidelines designed to aid in the decisionmaking process. Rather than entangling the schools in religion, the rules provide the means to ensure that the district steers clear of religious exercises."

[55] (Cert. Pet. A-71)

District Court expressly found that the "calm history" of the annual display of a creche was "marked by no apparent dissension".[56] In essence, the conclusion of the District Court was that although the nativity scene had never caused political debate in over 40 years, the political debate arising out of this lawsuit establishes a violation of the "excessive entanglements" principle. It is respectfully submitted that the Court of Appeals was correct in refusing to accept this portion of the District Court decision.

The complaint in this case was filed on December 17, 1980, and was accompanied by a motion for a temporary restraining order. By timing their legal action as they did and requesting a restraining order a few days before Christmas, these respondents caused a controversy which they now rely on as evidence of unconstitutionality. The political divisiveness shown on this record was caused not by sponsorship of the creche but by the bringing of this lawsuit at the height of the Christmas season. The District Court's conclusion as to the existence of political divisiveness prior to this legal action is obviously speculative and without evidentiary support in the record. The Court found that in none of the more than 40 years of the maintenance of the Christmas display prior to the institution of this legal action did any political dispute exist. It further found that the only controversy concerned this constitutional challenge. Nevertheless, the District Court concluded that the 40-year record of harmony merely disguised a subsurface dissension which appeared when the constitutional challenge was made.[57] It is submitted that the District Court's conclusion is contradictory of its own finding that the sponsorship of the Christmas celebration had a "track record" of community harmony. There is nothing in the record to support the conclusion that the City's incorporation of a creche in its Christmas display created political debate. What caused the political debate was the raising—one week before Christmas—

[56] (Cert. Pet. A-71)
[57] (Cert. Pet. A-71, A-72)

of the constitutional question that is before this Court. Clearly, political debate over constitutional questions, rather than being a sign of undesirable entanglement, is a healthy sign in a democracy. See *Lemon* v. *Kurtzman*, *supra*, 403, 622. The fact that the constitutional debate relates to the application of the Religion Clauses makes it no less an appropriate subject for political controversy.

Lemon v. *Kurtzman*, *supra*, dealt with the potential for political divisiveness in a new program which had no record of its political acceptability. However, in *Walz* v. *Tax Commission*, *supra*, this Court specifically had reference to the history of the practice of according tax exemptions to churches and from that history concluded that it was not productive of political divisiveness. In the case at bar, the City's Christmas display, with its creche, has been erected annually for over 40 years with a complete lack of political dissension. That is the only evidence in the record concerning the cause and effect between the sponsorship of the creche and its public acceptance. Accordingly, it is not necessary to examine the potential of the government action in this case to cause division along religious lines since the unbroken record of the City's action is that no such division did occur. When the division occurred, it was over the constitutional challenge to the City's action, and that, it is submitted, is not the political divisiveness which the third prong of the tri-partite test addresses.

As the Court of Appeals indicated, the District Court's finding as to the existence of political divisiveness—even if it were supported by evidence in the record—does not suffice to support its conclusion as to the existence of excessive entanglements. Political divisiveness is not in and of itself conclusive of a violation of the "excessive entanglements" portion of the tri-partite test. *Committee for Public Education* v. *Nyquist*, *supra*; *Lemon* v. *Kurtzman*, *supra*. It is only that political divisiveness which arises out of governmental involvement with religious activities or entities which produces the in-

firm constitutional conclusion. The real controversy shown by the evidence in this case was over the constitutionality of Christmas. Since government's involvement with Christmas is not a religious activity because of the dominant secular character of the Christmas holiday, then there is no religious relationship which would make material the existence of any political divisiveness. If the inclusion of a creche in a Christmas celebration rendered the government's sponsorship sufficiently religious in character to raise the danger of political divisiveness, then it would only be because Christmas itself is divisive because of its religious content.[58] The essential character of the City's sponsorship is legitimately secular and the nativity theme in the American Christmas tradition does not unconstitutionally infect the celebration of the national holiday.

[58] It is respectfully submitted that the analysis of Judge Campbell in his dissenting opinion is correct when he states: "In my opinion, the two most logically consistent positions are as follows: either Christmas itself, because of its inextricably intertwined religious roots, cannot constitutionally be a national holiday, in which case, displays of the type here in issue would also be unconstitutional; or else Christmas is constitutional, in which case all its relevant symbols, including those depicting the nativity, are likewise constitutional, *so long as displayed for the purpose of* announcing the holiday." (italics in original) (Cert. Pet. A-197)

Conclusion

For the reasons stated and upon the authorities cited, the judgment of the Court of Appeals should be reversed and the case should be remanded for entry of judgment in favor of the petitioners.

Respectfully submitted,

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